Supreme Court, U. S.
FILED
DEC 8 1980
MICHAEL RODAK, JR., CLERK

No. 80-518

In the Supreme Court of the United States

OCTOBER TERM, 1980

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL.,
PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor for Special Litigation

JOSEPH M. WOODWARD
JOSHUA T. GILLELAN II
Attorneys
Department of Labor
Washington, D.C. 20210

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-518

U.S. INDUSTRIES/FEDERAL SHEET METAL, INC., ET AL., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

QUESTIONS PRESENTED

1. Whether the presumption set forth in Section 20(a) of the Longshoremen's and Harbor Workers' Compensation Act, that a claim for compensation comes within the provisions of the Act, applies to the statutory requirement that a worker's injury arise "out of and in the course of" his employment.

2. Whether, in the circumstances of this case, the employer can overcome the Section 20(a) presumption by evidence that a particular employment-related accident did not occur.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	9

TABLE OF AUTHORITIES

Cases:

American Construction Co. v. *Jacksonville Ry.*, 148 U.S. 372	4
American National Red Cross v. *Hagen*, 327 F.2d 559	6
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327	4
Continental Ins. Co. v. *Byrne*, 471 F.2d 257, cert. denied, 406 U.S. 918	5-6
Eller & Co. v. *Golden*, 620 F.2d 71	6
Eschbach v. *Contractors, Pacific Naval Air Bases*, 181 F.2d 860	5
Furlong v. *O'Hearne*, 144 F. Supp. 266, aff'd, 240 F.2d 958	6
Gooding v. *Willard*, 209 F.2d 913	6
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251	4
John W. McGrath Corp. v. *Hughes*, 264 F.2d 314, cert. denied, 360 U.S. 931	7
Marra Bros. v. *Cardillo*, 154 F.2d 357	7
Newport News Shipbuilding & Dry Dock Co. v. *Director, O.W.C.P.*, 583 F.2d 1273, cert. denied, 440 U.S. 915	6
O'Keeffe v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359	7
Parsons Corp. v. *Director, O.W.C.P.*, 619 F.2d 38	7
Ridgley v. *Ceres, Inc.*, 594 F.2d 1175	7

Cases—Continued Page

Travelers Ins. Co. v. *Donovan*, 221 F.2d 886 6
Young & Co. v. *Shea*, 397 F.2d 185, cert. denied, 395 U.S. 920 6

Statutes:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* 1
Section 2(2), 33 U.S.C. 902(2) 5
Section 20(a), 33 U.S.C. 920(a) 3, 4, 5, 6, 7
District of Columbia Workmen's Compensation Act, Section 1, D.C. Code Ann. § 36-501 (1973) .. 2

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-11a) is reported at 627 F.2d 455. The opinion of the Benefits Review Board (Pet. App. 12a-18a) is reported at 9 B.R.B.S. 936. The opinion of the administrative law judge (Pet. App. 19a-26a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 22, 1980. A petition for rehearing was denied on July 3, 1980 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 30, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Ralph Riley worked as a sheet metal worker for 32 years. He had been employed by petitioner U.S. Industries for some three weeks when he awoke in the early morning hours of November 20, 1975, with acute pain in his arms and chest. Riley was hospitalized immediately for treatment of a suspected heart attack, but the hospital subsequently determined that his pain resulted from an acute exacerbation of cervical osteoarthritis, from which he had suffered recurrently since 1970, and a hiatal hernia (Pet. App. 12a-13a). It is undisputed that, since that hospitalization, Riley has been permanently and totally disabled from employment.

Riley filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act ("the Act"), 33 U.S.C. 901 *et seq.*, as extended to private employment in the District of Columbia

by Section 1 of the District of Columbia Workmen's Compensation Act, D.C. Code Ann. § 36-501 (1973). At a hearing before an administrative law judge, Riley testified that late on the afternoon of November 19, 1975, the day preceding his hospitalization, he had accidentally hit his neck and shoulders on an overhead duct and had felt a sharp pain in the back of his head, in his arms, and in his chest. Riley's close friend, Howard Sutherland, corroborated his testimony (Pet. App. 13a, 20a-21a). The administrative law judge, crediting disputed evidence that Riley had not reported the accident to his treating physicians or his employer until a considerable time after his hospitalization, concluded that Riley and Sutherland had fabricated the story of the accident and that no such incident had occurred. Without further discussion of the cause of the worsening of Riley's symptoms, the administrative law judge denied his claim (Pet. App. 19a-26a).

Riley appealed to the Benefits Review Board, which affirmed by a two-to-one vote. The Board majority concluded that the administrative law judge's finding that the alleged accident had not occurred had a reasonable basis in the record (Pet. App. 12a-16a). Board Member Miller dissented on the ground that "the real issue in this case is not whether claimant sustained an accident at work but whether claimant's injury is causally related to his employment" (*id.* at 17a-18a). Member Miller reasoned that because the administrative law judge incorrectly focused his attention exclusively on whether the claimant had sustained a particular accident, his decision contained no analysis or findings as to whether the employer had presented sufficient evidence to rebut the presumption contained in Section

20(a) of the Act that the claim comes within the provisions of the Act (*id.* at 18a).[1] Accordingly, he would have remanded the case to the administrative law judge for further findings (*ibid.*).

The claimant filed a petition for review of the Benefits Review Board's decision in the court of appeals, and the Director, Office of Workers' Compensation Programs, intervened in support of his position. The court of appeals reversed the Board's decision and remanded for further proceedings (Pet. App. 3a-11a). The court did not question the administrative law judge's finding that the alleged accident had not occurred. It held instead that "the injuries suffered by the claimant [the sudden exacerbation of his arthritic neck condition] might nevertheless have been 'employment-bred' " and that the claimant was entitled, by virtue of Section 20(a) of the Act, 33 U.S.C. 920(a), to the rebuttable presumption that they were (Pet. App. 10a). Because the administrative law judge had focused exclusively on the occurrence of the alleged accident, however, he had not made the necessary findings. Accordingly, the court remanded the case for further consideration, without "anticipat[ing] what these findings will be" (*id.* at 11a).

---

[1] Section 20(a) of the Act, 33 U.S.C. 920(a), provides in pertinent part:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.

ARGUMENT

The decision of the court of appeals did not finally dispose of the claim in this case, but merely remanded it for additional findings that may or may not result in an award of compensation. Should the remand result in denial of the claim, petitioners will have no need of relief from this Court. Should the remand result in an award of compensation in reliance on the Section 20(a) presumption as construed by the court of appeals (and should the award be affirmed by that court), petitioners may renew their contentions here. There is, accordingly, no reason for this Court to depart from its usual practice of declining to review nonfinal orders of courts of appeals. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Construction Co.* v. *Jacksonville Ry.*, 148 U.S. 372, 384 (1893).

Review is, in any event, unwarranted because, as we show below, the court of appeals' decision correctly reflects the language and purpose of the Section 20(a) presumption and is consistent with the law now in effect in all circuits in which the presumption issue has been considered.

1. Section 20(a) of the Act, 33 U.S.C. 920(a), provides a broad rebuttable presumption that a claim for compensation "comes within the provisions of [the Act]." Petitioners contend (Pet. 7-14) that the court of appeals erred in holding (Pet. App. 10a) that "where a claimant has been injured, the Act requires that, in the absence of substantial evidence to the contrary, a claimant be given the benefit of a rebuttable presumption that the injury arose out of

and in the course of the claimant's employment." [2] Petitioners further contend (Pet. 7-11) that this holding is contrary to the rule followed in the Seventh, Fifth, Fourth, and Second Circuits. The cases on which petitioners rely for the asserted conflict, however, have been superseded in each circuit by more recent decisions applying the presumption to the relationship between a claimant's injury and his employment.

Thus, petitioners rely primarily on the Seventh Circuit's decision in *Eschbach* v. *Contractors, Pacific Naval Air Bases*, 181 F.2d 860 (1950), holding the presumption inapplicable to the question whether the claimant's tuberculosis arose out of his employment. But more recently the Seventh Circuit has ruled otherwise, citing Section 20(a) and holding that "where there is a doubtful factual question as to whether an injury arises out of employment, the law presumes compensability." *Continental Ins.*

---

[2] In this holding the court of appeals is obviously using the terms "injured" and "injury" in the layman's sense of those terms, *i.e.* in the sense of the term "injury" as it occurs within the Act's definition of "injury" in Section 2(2), 33 U.S.C. 902(2). That section, in pertinent part, provides: "The term 'injury' means accidental *injury* or death arising out of and in the course of employment * * *" (emphasis added). The court noted (Pet. App. 8a) that the evidence was "undisputed" that claimant suffered an injury in the form of a sudden exacerbation of his arthritic neck condition, so severe as to require hospitalization; and it further explained (*id.* at 10a n.3) that because the case therefore did not present the issue "whether the statutory presumption of compensability applies not only to the fact of causality, but also to the fact of injury," it had no occasion "to address this question." Unless otherwise stated we use the term in the layman's sense, *i.e.* without reference to the employment nexus requirement.

Co. v. *Byrne*, 471 F.2d 257, 260 (7th Cir.), cert. denied, 406 U.S. 918 (1972).[3]

The cases from the Fourth and Fifth Circuits on which petitioners rely merely contain dicta suggesting that the Section 20(a) presumption does not apply to the relationship between a claimant's injury and his employment. *Furlong* v. *O'Hearne*, 144 F. Supp. 266, 271 (D. Md. 1956), aff'd, 240 F.2d 958 (4th Cir. 1957); *Young & Co.* v. *Shea*, 397 F.2d 185, 188 (5th Cir. 1968), cert. denied, 395 U.S. 920 (1969). In any event, those circuits have, in more recent cases, applied the presumption to the relationship between employment and the injury or disabling condition. See *Newport News Shipbuilding & Dry Dock Co.* v. *Director, O.W.C.P.*, 583 F.2d 1273, 1281 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979); *Eller & Co.* v. *Golden*, 620 F.2d 71, 73 (5th Cir. 1980).

Petitioners' contention (Pet. 10-11) that a contrary rule exists in the Second Circuit is also unfounded. That court's statement in *Gooding* v. *Willard*, 209 F.2d 913, 916 (2d Cir. 1954), that "[w]e might let the decision turn on the above, but it should also be noted that the burden to show that the accident was a contributing cause of the death was on the [claimant,]" was obviously dictum. In any event, the Second Circuit subsequently has taken a different view.

---

[3] See also *American National Red Cross* v. *Hagen*, 327 F.2d 559 (7th Cir. 1964). The Seventh Circuit there held that "the ruling applied in *Travelers Ins. Co.* v. *Donovan* [221 F.2d 886, 888 (D.C. Cir. 1955)] is controlling" (327 F.2d at 561), and it described that holding as follows: "'[A]bsent substantial evidence to the contrary, a disability occurring in the course of employment must be presumed to have arisen therefrom'" (*id.* at 560, quoting *Travelers Ins. Co.* v. *Donovan*, *supra*, 221 F.2d at 888).

In *John W. McGrath Corp.* v. *Hughes*, 264 F.2d 314, 317 (2d Cir.), cert. denied, 360 U.S. 931 (1959), the court recognized that the Section 20(a) presumption could apply to show that a claimant's disability and subsequent death arose out of his employment, although it found, on the record before it, that the employer had offered sufficient evidence to rebut the presumption.

In addition to the decisions cited above, the Third, Eighth and Ninth Circuits, the only other courts of appeals to have considered the question, have also held the presumption applicable to the requirement that the claimant's injury or disabling condition arise out of his employment. *Marra Bros.* v. *Cardillo*, 154 F.2d 357, 359 (3d Cir. 1946); *Ridgley* v. *Ceres, Inc.*, 594 F.2d 1175, 1177 (8th Cir. 1979); *Parsons Corp.* v. *Director, O.W.C.P.*, 619 F.2d 38, 40-41 (9th Cir. 1980). These decisions are consistent with the plain language of the Section 20(a) presumption, as well as with "the humanitarian nature of the Act," which this Court has held the presumption exemplifies. *O'Keeffe* v. *Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 362-363 (1965). See also *id.* at 361, stating that the presumption applies to limit the scope of judicial review of an administrative finding that a particular injury arose out of and in the course of employment.

2. Petitioners also contend (Pet. 17-21) that, assuming the Section 20(a) presumption applies, the court of appeals nevertheless erred in failing to find that it was rebutted by substantial evidence. This contention essentially rests on the erroneous argument (Pet. 18-20) that in failing to make such a finding the court of appeals usurped the administrative fact-finding function on this question.

Nothing in the court of appeals' opinion provides any basis for this argument.[4] The court did not disturb the administrative finding that the accident to which Riley had testified did not occur, *i.e.* that his injury did not occur "as alleged" (Pet. App. 24a). Rather, it held that the exclusive focus of the administrative law judge and the majority of the Benefits Review Board on the evidence regarding the accident was too narrow. The administrative finding against Riley on that question, although valid, was an insufficient basis for rejecting his claim, because it did not resolve the broader question whether his injury was precipitated or aggravated by the ordinary conditions of his employment as a sheet metal worker (Pet. App. 10a-11a).

Thus, far from reweighing the evidence, the court of appeals simply ruled that the administrative law judge "did not make all the findings necessary for a proper disposition of [the] claim" (Pet. App. 11a). Accordingly, the court remanded the case so the agency could make the necessary findings, noting that "[w]e cannot anticipate what these findings will be" (*ibid.*).

---

[4] Nor does the court of appeals' decision have the effect, ascribed to it by petitioners (Pet. 14-16), of making the Longshoremen's Act "general health insurance covering anything that goes wrong in the human frame" (Pet. 14). Petitioners' suggestion that Riley's condition is not compensable because it is a result of the "daily hazards involved in ordinary living" (Pet. 14) is not foreclosed by the court's decision and may be presented to the administrative law judge on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor
for Special Litigation

JOSEPH M. WOODWARD
JOSHUA T. GILLELAN II
Attorneys
Department of Labor

DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 334218 107